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No. 94-57

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HTC INDUSTRIES, INC.,

Petitioner,

v.

WILLIAM PERRY, SECRETARY
OF DEFENSE,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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The government's brief in opposition evades the questions presented, distorts the factual findings of the Board of Contract Appeals, and ignores the conflicts between the decision of the Federal Circuit in this case and the long line of precedents from this Court and the Court of Claims.

The government directs its brief in opposition to a question not presented in the petition -- i.e., whether the government employees who misled petitioner, HTC Industries, Inc. ("HTC"), were contracting officers. Gov't

Brief at 7-8. HTC assumes, without conceding, that they were not.

The questions that are presented -- and that the government never discusses -- profoundly affect the area of government contract law: (1) whether the government's contractual duty of good faith and fair dealing extends to the affirmative misrepresentations of contract personnel other than contracting officers, and (2) if these personnel take something from a contractor for the benefit of the government, whether the contractor is entitled to equitable relief for the value of that benefit. By ignoring these issues, the government hopes to preserve the unfair contracting advantage the Federal Circuit has given it here and in *Hoskins Lumber Co. v. United States*, 20 F.3d 1144 (Fed. Cir. 1994).[1] This Court should address these issues and restore balance between the government and its contractors.

In an apparent attempt to convince the Court that this case involves a "factbound" decision unworthy of review, Gov't Brief at 7, the government misrepresents the controlling findings of the Board of Contract Appeals. Most brazenly, the government states that "[b]oth the Board and the court of appeals rejected [the] factual claim" that "a 'misrepresentation' by [a] government employee as to the availability of a contracting officer prevented petitioner from

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[1] For a discussion of *Hoskins*, see Pet. at 20-22. On July 5, 1994, the Federal Circuit denied the contractor's petition for rehearing and declined its suggestion of rehearing en banc in *Hoskins*. 1994 U.S. App. Lexis 18039 (Fed. Cir. 1994).

dealing with one." Gov't Brief at 8 n.4. HTC respectfully refers the Court to the Board's findings: "[i]n early August 1986, Dr. Couch had called the AMTL Contracts Division and talked to Andrew DeVita, a contract specialist assigned to this contract (tr. 2/58). Mr. DeVita advised him that *no contracting officer had been assigned to the subject contract* ...." Pet. App. at 35a-36a (emphasis added). *See* Pet. at 4-5. Contrary to the government's suggestion, nothing in the decision of the Court of Appeals in any way rejects this factual finding of the Board. Pet. App. at 1a-8a.

All the while, the government knew it had assigned a new CO to the contract and never notified HTC. Pet. App. at 35a-36a. That fact reveals the falsity in the government's next contention that Dr. Couch "studiously avoided communication with anyone other than [the COTR] as a calculated tactic to maximize his chance for additional funding." Gov't Brief at 8 n.4. Dr. Couch could not communicate with the CO because the government would not tell him who the CO was. *See* Pet. App. at 10a. Indeed, the "barely visible" CO studiously avoided her regulatory obligation to respond to HTC's written proposal for overrun funding. *See* Pet. App. at 35a-36a; 48 C.F.R. § 32.704 (reprinted in Pet. App. at 84a-85a).

The government's statement of the case is no better. Gov't Brief at 2-7. A full exposition of every error it contains is not appropriate here, but two examples should suffice to discredit it. First, the government's statement does not provide a single date to give context to the events that happened. *Id.* For example, the government relies on Dr. Couch's having laid off an employee and his having

written a letter about budget cuts as evidence of his knowledge that the project would not receive additional funding. Gov't Brief at 4-5 n.3. The government fails to mention that both of these events occurred in February 1987 at the very end of the period of continued work and long after most of the COTR's misrepresentations about further funding. Pet. App. at 31a-32a.

Second, the government's statement leaves large gaps in the story. For example, it does not mention the government's bad faith in the settlement negotiations in the spring of 1988. *See* Gov't Brief at 5. *Cf.* Pet. at 6-7; Pet. App. at 14a-16a, 37a-39a. In short, the government's rendition of the facts is "without foundation" -- not HTC's. *See* Gov't Brief at 8 n.4.

The government's inaccurate reporting of the record should not lead the Court to the conclusion that this case is factbound and inappropriate for review here. In fact, this case presents two fundamental legal issues in the area of government contract law, and the Board's factual findings provide a concrete and unambiguous background for the resolution of those issues in this case.

On both issues, HTC's petition identified conflicts between the decision of the Federal Circuit in this case and a long line of precedents from this Court and the Federal Circuit's predecessor, the Court of Claims. Pet. at 12-19. The government's brief does not address these conflicts at all. HTC submits that by failing to address these conflicts, the government tacitly admits that they exist and that they must be resolved. These serious conflicts warrant this

Court's review. Moreover, HTC suggests that summary reversal is in order, particularly as to the equitable relief issue.

The petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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